

OTHER PROVISIONS

- 1) Order of Precedence; Vendor Documentation. The parties specifically agree that any language or provisions contained in a Vendor Document is of no force and effect if such language or provisions conflict with the terms of Attachment C or Attachment D to this Contract. Further, in no event shall any Vendor Document (a) require indemnification by the State of the Vendor; (b) waive the State's right to a jury trial; (c) establish jurisdiction in any venue other than the Superior Court of the State of Vermont, Civil Division, Washington Unit; (d) constitute an implied or deemed waiver of the immunities, defenses, rights or actions arising out of State's sovereign status or under the Eleventh Amendment to the United States Constitution; or (e) limit the time within which an action may be brought hereunder.

For purposes of this Attachment D, "Vendor Document" shall mean one or more document, agreement or other instrument required by the Vendor in connection with the performance of the services contemplated regardless of format.

- 2) Term of Vendor's Documents. Notwithstanding anything to the contrary in a Vendor Document, all Vendor Documents shall run concurrently with the term of this Contract.
- 3) Indemnification. The Vendor acknowledges and agrees that the laws and the public policy of the State of Vermont prohibit the State from agreeing to indemnify contractors and other parties. The Vendor agrees that, to the extent a Vendor Document expressly provides for or implies indemnification of the Vendor and/or other third parties by the State, such sections shall be waived and have no force and effect with respect to the State.
- 4) Limitation on Disclaimer. Notwithstanding anything to the contrary set forth in a Vendor Document, the express warranties set forth in this Contract shall be in lieu of all other warranties, express or implied.
- 5) Liability. Notwithstanding anything to the Contrary in Attachment C or in a Vendor Document:
  - (i) The Vendor shall defend the State and its officers and employees against all third party claims or suits and any damages or losses from such third party claims or suits which arise in whole or in part from any negligent act or omission or intentional misconduct of the Vendor or of any agent of the Vendor. The State shall promptly notify the Vendor in the event of receipt of notice of any such claim or suit, and the Vendor shall promptly retain counsel and, at its option, either provide a complete defense against or settle the third party claim or suit.
  - (ii) After a final judgment or settlement the Vendor may request recoupment of specific defense costs and may file suit in the Superior Court of the State of Vermont,

Washington Civil Division requesting recoupment. The Vendor shall be entitled to recoup costs upon a showing that such costs were entirely unrelated to the defense of any claim arising from a negligent act or omission or intentional misconduct of the Vendor.

(iii) The Vendor shall indemnify the State and its officers and employees in the event that the State, its officers or employees become legally obligated to pay any damages or losses arising from any third party claims or suits for which the Vendor is obligated to defend the State and its officers and employees pursuant to subparagraph (a) above.

(iv) *IN NO EVENT SHALL THE CONTRACTOR'S AGGREGATE LIABILITY TO THE STATE EXCEED THE GREATER OF THE LIMIT OF CONTRACTOR'S PROFESSIONAL LIABILITY INSURANCE AND THE TOTAL AMOUNT OF THE CONTRACT.* THIS LIMITATION SHALL NOT APPLY TO STATE CLAIMS ARISING OUT OF (A) CONTRACTOR'S OBLIGATION TO INDEMNIFY THE STATE FOR COPYRIGHT, PATENT OR OTHER INTELLECTUAL PROPERTY INFRINGEMENT; (B) CONTRACTOR'S CONFIDENTIALITY OBLIGATIONS TO THE STATE; (C) PERSONAL INJURY OR DAMAGE TO REAL OR PERSONAL PROPERTY; OR (D) CONTRACTOR'S GROSS NEGLIGENCE, FRAUD OR INTENTIONAL MISCONDUCT. IN NO EVENT SHALL CONTRACTOR'S LIABILITY BE LIMITED FOR THIRD PARTY CLAIMS AGAINST THE CONTRACTOR WHICH MAY ARISE OUT OF CONTRACTOR'S ACTS OR OMISSIONS IN THE PERFORMANCE OF THIS CONTRACT.

THE CONTRACTOR SHALL NOT BE LIABLE TO THE STATE FOR ANY INDIRECT, INCIDENTAL OR SPECIAL DAMAGES, DAMAGES WHICH ARE UNFORESEEABLE TO THE PARTIES AT THE TIME OF CONTRACTING, DAMAGES WHICH ARE NOT PROXIMATELY CAUSED BY A PARTY OR LOSS OF ANTICIPATED BUSINESS OR PROFITS IN CONNECTION WITH OR ARISING OUT OF THE SUBJECT MATTER OF THIS CONTRACT.

(v) The provisions of this Section shall apply notwithstanding any other provisions of this Contract or any other agreement. The provisions of this Section shall survive the expiration or termination of this Contract.

- 6) Trial by Jury. The Vendor acknowledges and agrees that notwithstanding anything to the contrary in the Vendor's Documents, the State shall not agree to arbitration. Further, the State is prohibited by policy from waiving, and shall not waive, any right to a trial by jury.
- 7) Confidentiality of Vendor Information. Notwithstanding anything to the contrary in a Vendor Document, the State will not disclose information for which a reasonable claim can be made that the information is exempt from disclosure pursuant to 1 V.S.A. § 317(c), including, but not limited to, trade secrets, proprietary information or financial information, including any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to the Vendor, and which gives the Vendor an opportunity to obtain business advantage over competitors who do not know it or use it.

The State shall immediately notify Vendor of any request made under the Access to Public Records Act, or any request or demand by any court, governmental agency or other person asserting a demand or request for Vendor information. Vendor may, in its discretion, seek an appropriate protective order, or otherwise defend any right it may have to maintain the confidentiality of such information under applicable State law within three business days of the State's receipt of any such request. Vendor agrees that it will not make any claim against the State if the State makes available to the public any information in accordance with state or federal law, including the Access to Public Records Act, or in response to a binding order from a court or governmental body or agency compelling its production. Vendor shall indemnify the State for any costs or expenses incurred by the State, including attorneys' fees awarded in accordance with 1 V.S.A. § 320, or otherwise incurred by the State, in connection with any action brought by Vendor or a third party in connection with Vendor's attempts to prevent public disclosure of Vendor's information.

- 8) Jurisdiction. Notwithstanding anything to the contrary in the Vendor's Documents, the Vendor agrees that any action or proceeding brought by either the State or the Vendor in connection with this Contract shall be brought and enforced in the Superior Court of the State of Vermont, Civil Division, Washington Unit. The Vendor irrevocably submits to the jurisdiction of such court in respect of any such action or proceeding. The State shall not be liable for attorneys' fees in any proceeding.
- 9) Governing Law. Notwithstanding anything to the contrary in a Vendor Document, the Vendor agrees that this Contract, including any Vendor Document, shall be governed by and construed in accordance with, the laws of the State of Vermont.
- 10) Warranties. The Vendor represents, warrants and covenants that:
  - (i) The Vendor has all requisite power and authority to execute, deliver and perform its obligations under this Agreement and the execution, delivery and performance of this Agreement by the Vendor has been duly authorized by the Vendor.
  - (ii) There is no outstanding litigation, arbitrated matter or other dispute to which the Vendor is a party which, if decided unfavorably to the Vendor, would reasonably be expected to have a material adverse effect on the Vendor's ability to fulfill its obligations under this Agreement.
  - (iii) The Vendor will comply with all laws applicable to its performance of the services and otherwise to the Vendor in connection with its obligations under this Agreement.
  - (iv) All deliverables will be free from material errors and shall perform in accordance with the specifications therefor.
  - (v) The Vendor owns or has the right to use under valid and enforceable agreements, all intellectual property rights reasonably necessary for and related to delivery of the services and provision of the deliverables as set forth in this

Agreement and none of the deliverables or other materials or technology provided by the Vendor to the State will infringe upon or misappropriate the intellectual property rights of any third party.

- (vi) Each and all of the services shall be performed in a timely, diligent, professional, and workpersonlike manner, in accordance with the highest professional or technical standards applicable to such services, by qualified persons with the technical skills, training and experience to perform such services in the planned environment. At its own expense and without limiting any other rights or remedies of the State hereunder, the Vendor shall re-perform any services that the State has determined to be unsatisfactory in its reasonable discretion, or the Vendor will refund that portion of the fees attributable to each such deficiency.
  - (vii) The Vendor has adequate resources to fulfill its obligations under this Agreement.
- 11) Virus Protection. Vendor warrants and represents that any time software is delivered to the State, whether delivered via electronic media or the internet, no portion of such software or the media upon which it is stored or delivered will have any type of software routine or other element which is designed to facilitate unauthorized access to or intrusion upon; or unrequested disabling or erasure of; or unauthorized interference with the operation of any hardware, software, data or peripheral equipment of or utilized by the State. Notwithstanding the foregoing, Vendor assumes no responsibility for the State's negligence or failure to protect data from viruses, or any unintended modification, destruction or disclosure.
- 12) Effect of Breach of Warranty. If, at any time during the term of this Contract, software or the results of Vendor's work fail to perform according to any warranty of Vendor under this Contract, the State shall promptly notify Vendor in writing of such alleged nonconformance, and Vendor shall provide at no additional cost of any kind to the State, the maintenance required.
- 13) Trade Secret, Patent, and Copyright Infringement. Notwithstanding anything to the contrary in the Vendor's Documents regarding intellectual property and infringement claims, the State shall not be deemed to waive any of its rights or remedies at law or in equity in the event of Vendor's trade secret, patent and/or copyright infringement.
- 14) Taxes: Most State purchases are not subject to federal or state sales or excise taxes and must be invoiced tax free. An exemption certificate will be furnished upon request covering taxable items. The Vendor agrees to pay all Vermont taxes which may be due as a result of this Contract.
- 15) Professional Liability Insurance Coverage. In addition to the insurance required in Attachment C to this Contract, Vendor agrees to procure and maintain professional liability insurance for any and all services performed under this Contract, with a minimum coverage of \$5,000,000 per occurrence.

- 16) Intellectual Property/Work Product Ownership. (i) All data, technical information, materials first gathered, originated, developed, prepared for, or obtained as a condition of this Contract and used in the performance of this Contract—including, but not limited to, all reports, surveys, plans, charts, literature, brochures, mailings, recordings (video or audio), pictures, drawings, analyses, graphic representations, software computer programs and accompanying documentation and printouts, notes and memoranda, written procedures and documents—a shall be considered "work for hire" and remain the property of the State of Vermont, regardless of the state of completion unless otherwise specified in this Contract. Such items shall be delivered to the State of Vermont upon 30 days notice by the State. With respect to software computer programs and / or source codes first developed for the State, all the work shall be considered "work for hire," i.e., the State, not the Vendor or subcontractor, shall have full and complete ownership of all software computer programs, documentation and/or source codes developed.
- (ii) Upon full payment to Vendor hereunder, and subject to the terms and conditions contained herein, Vendor hereby (i) assigns to State all rights in and to the Deliverables, except to the extent they include any Vendor Technology; and (ii) grants to State the right to use, for State's internal business purposes, any Vendor Technology included in the Deliverables in connection with its use of the Deliverables. Except for the foregoing license grant, Vendor or its licensors retain all rights in and to all Vendor Technology.

For purposes of these terms (i) "Technology" means works of authorship, materials, information and other intellectual property; (ii) "Vendor Technology" means all Technology created prior to or independently of the performance of the Services, or created by Vendor or its subcontractors as a tool for their use in performing the Services, plus any modifications or enhancements thereto and derivative works based thereon; and (iii) "Deliverables" means all Technology that Vendor or its subcontractors create for delivery to State as a result of the Services.

The Vendor shall not sell or copy a work product or item produced under this Contract without explicit permission from the State.

If the Vendor is operating a system or application on behalf of the State of Vermont, then the Vendor shall not make information entered into the system or application available for uses by any other party than the State of Vermont, without prior authorization by the State. Nothing herein shall entitle the State to pre-existing Vendor Technology.

- 17) Confidentiality of State Information. Vendor agrees to keep confidential all information received and collected by Vendor in connection with this contract, including, but not limited to **claims and eligibility data, and supporting meta-data such as reporting organizations, code sets, data validation rules, and calculations documentation.** ("State Data") unless otherwise instructed by the State. The Vendor agrees not to publish, reproduce, or otherwise divulge any such State Data in whole or in part, in any manner or form or authorize or permit others to do so. Vendor will take reasonable measures as are necessary to restrict access to State Data in the Vendor's possession to those employees on his/her staff who must have the information on a "need to know" basis. The Vendor shall promptly notify the State of any request or demand by any court, governmental

agency or other person asserting a demand or request for State Data to which the Vendor or any third party hosting service of the Vendor may have access, so that the State may seek an appropriate protective order. The Vendor represents and warrants that it has implemented and it shall maintain during the Term of this Agreement the highest industry standard administrative, technical, and physical safeguards and controls consistent with NIST *Special Publication 800-53* and *Federal Information Processing Standards Publication 200* and designed to (i) ensure the security and confidentiality of State Data; (ii) protect against any anticipated security threats or hazards to the security or integrity of the State Data; and (iii) protect against unauthorized access to or use of State Data. Such measures include at a minimum, as applicable: (1) access controls on information systems, including controls to authenticate and permit access to State Data only to authorized individuals and controls to prevent the Vendor employees from providing State Data to unauthorized individuals who may seek to obtain this information (whether through fraudulent means or otherwise); (2) industry-standard firewall protection; (3) encryption of electronic State Data while in transit from the Vendor networks to external networks; (4) measures to store in a secure fashion all State Data which shall include multiple levels of authentication; (5) dual control procedures, segregation of duties, and pre-employment criminal background checks for employees with responsibilities for or access to State Data; (6) measures to ensure that the State Data shall not be altered or corrupted without the prior written consent of the State; (7) measures to protect against destruction, loss or damage of State Data due to potential environmental hazards, such as fire and water damage; (8) staff training to implement the information security measures; and (9) monitoring of the security of any portions of the Vendor systems that are used in the provision of the services against intrusion on a twenty-four (24) hour a day basis.

- 18) Security Breach Reporting. The Vendor acknowledges that in the performance of its obligations under this Agreement, it will be a “data collector” pursuant to Chapter 62 of Title 9 of the Vermont Statutes (9 V.S.A. § 2430(3)). In the event of any actual or suspected security breach the Vendor either suffers or learns of that either compromises or could compromise State Data in any format or media, whether encrypted or unencrypted (including PII, PHI or ePHI)(for example, but not limited to, physical trespass on a secure facility, intrusion or hacking or other brute force attack on any State environment, loss/theft of a PC or other portable device (laptop, desktop, tablet, smartphone, removable data storage device), loss/theft of printed materials, failure of security policies, etc.) (collectively, a “Security Breach”), and in accordance with 9 V.S.A. § 2435(b)(2), the Vendor will immediately notify appropriate State personnel of such Security Breach.

The Vendor's report shall identify: (i) the nature of the Security Breach, (ii) the State Data used or disclosed, (iii) who made the unauthorized use or received the unauthorized disclosure, (iv) what the Vendor has done or shall do to mitigate any deleterious effect of the unauthorized use or disclosure, and (v) what corrective action the Vendor has taken or shall take to prevent future similar unauthorized use or disclosure. The Vendor shall

provide such other information, including a written report, as reasonably requested by the State.

In addition to any other indemnification obligations in this agreement, the Vendor shall fully indemnify and hold harmless the State from any costs, loss or damage to the State resulting from a Security Breach or the unauthorized disclosure by the Vendor, its officers, agents, employees, and subcontractors of such State Data.

- 19) Continuity of Performance. In the event of a dispute between the Vendor and the State, each party will continue to perform its obligations under this Agreement during the resolution of such dispute unless and until this Agreement is terminated in accordance with its terms.
- 20) Audit Requirements. The Vendor shall cause an SSAE 16 Type II audit certification to be conducted annually. The audit results and the Vendor's plan for addressing or resolution of the audit results shall be shared with the State within sixty (60) days of the Vendor's receipt of the audit results. Further, on an annual basis, within 90 days of the end of the Vendor's fiscal year, the Vendor shall transmit its annual audited financial statements to the State.
- 21) Access to State Data: Within ten (10) business days of a request by State and within thirty (30) days after the effective date of termination of this contract, the Vendor will make available to State a complete and secure (i.e. encrypted and appropriately authenticated) download file of State Data in a format acceptable to State including all schema and transformation definitions and/or delimited text files with documented, detailed schema definitions along with attachments in their native format. *Provided, however,* in the event the Vendor ceases conducting business in the normal course, becomes insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets or avails itself of or becomes subject to any proceeding under the Federal Bankruptcy Act or any statute of any state relating to insolvency or the protection of rights of creditors, the Vendor shall immediately return all State Data to State control; including, but not limited to, making all necessary access to applicable remote systems available to the State for purposes of downloading all State Data.
- 22) Ownership of State Data; User Name Vendor acknowledges and agrees that all State trademarks, trade names, logos and other State identifiers, Internet uniform resource locators, State user name or names, Internet addresses and e-mail addresses obtained or developed pursuant to this Contract shall be the property of State. All content and all property, data and information furnished by or on behalf of the State or any agency, commission or board thereof, to Vendor to facilitate Vendor's performance under the Contract ("State Materials") shall be and remain the sole property of the State and that the Vendor acquires no rights or licenses, including, without limitation, intellectual

property rights or licenses, to use State Materials for its own purposes. In no event shall the Vendor claim any security interest in the State Materials.

- 23) Access to State Materials. Within ten (10) business days of a request by State and within sixty (60) days after the effective date of termination of this contract, Vendor will make available to State a complete and secure (i.e. encrypted and appropriately authenticated) download file of State Materials in a format acceptable to State including all schema and transformation definitions and/or delimited text files with documented, detailed schema definitions along with attachments in their native format. *Provided, however*, in the event the Vendor ceases conducting business in the normal course, becomes insolvent, makes a general assignment for the benefit of creditors, suffers or permits the appointment of a receiver for its business or assets or avails itself of or becomes subject to any proceeding under the Federal Bankruptcy Act or any statute of any state relating to insolvency or the protection of rights of creditors, the Vendor shall immediately return all State Materials to State control; including, but not limited to, making all necessary access to applicable remote systems available to the State for purposes of downloading all State Materials.

The Vendor's policies regarding the retrieval of data upon the termination of services have been made available to the State upon execution of this Contract under separate cover. The Vendor shall provide the State with not less than thirty (30) days advance written notice of any material amendment or modification of such policies. The parties agree that upon termination of this Contract, the Vendor shall, at the choice of the State, either return all the State Materials transferred and the copies thereof to the State or shall destroy all the State Materials and certify to the State that it has done so.

- 24) Service Level Agreement. During the Term of this Contract, the Software and Services provided hereunder will be operational and available to the State at least 99.5% of the time in any calendar month (the "Vendor SLA").

"Downtime" means any time during which the database is inoperable, inaccessible by the State due to Vendor side issues, or there is more than a five percent user error rate. Downtime is measured based on server side error rate.

"Downtime Period" means a period of ten consecutive minutes of Downtime. Intermittent Downtime for a period of less than ten minutes will not be counted towards any Downtime Periods.

"Monthly Uptime Percentage" means total number of minutes in a calendar month minus the number of minutes of Downtime suffered from all Downtime Periods in a calendar month, divided by the total number of minutes in a calendar month.

"Scheduled Downtime" means those times where Vendor notified State of periods of Downtime at least three days prior to the commencement of such Downtime. Scheduled Downtime will occur outside of the State of Vermont normal working hours or 7:45 am EST to 4:30 pm EST, Monday through Friday. Scheduled Downtime is not



considered Downtime for purposes of this Vendor SLA, and will not be counted towards any Downtime Periods.

If Vendor does not meet the Vendor SLA, and if State meets its obligations under this Vendor SLA, State will be eligible to receive the Service Credits described below.

If in a calendar month the 99.5% uptime commitment is not met, the Vendor will credit the State with one month of Subscription Fees. This credit is the sole and exclusive remedy, and must be requested in writing prior to the tenth day of the month following such service level interruption. This credit will extend the current subscription term by one month.

If Vendor fails to meet normal Software Warranties and service is discontinued, the Service Credit shall be in the form of a pro-rata refund at the end of service.

- 25) Back-Up Policies: The Vendor's back-up policies shall be made available to the State upon execution of this Contract under separate cover. The Vendor shall provide the State with not less than thirty (30) days advance written notice of any material amendment or modification of such policies.
- 26) Data Format; Encryption. The Vendor agrees to maintain State data on a database server in a secure production environment. The Vendor's encryption policy and related security policies have been made available to the State upon execution of this Contract under separate cover. The Vendor shall provide the State with not less than thirty (30) days advance notice of any material amendment or modification of such policies.
- 27) Vendor Bankruptcy. Vendor acknowledges that if Vendor, as a debtor in possession, or a trustee in bankruptcy in a case under Section 365(n) of Title 11, United States Code (the "Bankruptcy Code"), rejects this Contract, the State may elect to retain its rights under this Contract as provided in Section 365(n) of the Bankruptcy Code. Upon written request of the State to Vendor or the Bankruptcy Trustee, Vendor or such Bankruptcy Trustee shall not interfere with the rights of the State as provided in this Contract, including the right to obtain the State Materials.